

EX COPY

No. 36, ORIGINAL

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff

v.

THE STATE OF LOUISIANA,

Defendant

BEFORE THE HONORABLE
ROBERT VAN PELT, SPECIAL MASTER

ANSWER OF THE STATE OF TEXAS
TO COUNTERCLAIMS OF THE
STATE OF LOUISIANA

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**ANSWER OF THE STATE OF TEXAS
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The State of Texas, by its Attorney General, in answer to the Counterclaims filed herein by the State of Louisiana, respectfully replies and avers:

I.

ANSWER TO COUNTERCLAIM NO. 1

In answer to paragraph 1 of Counterclaim No. 1, the State of Texas denies that the United States was appearing on behalf of the State of Louisiana when it entered into treaties with other Nations fixing the western limits of the territory of the United States along the west bank of the Sabine River from the Gulf of Mexico to the 32nd degree of north latitude

and thence due north to the 33rd degree of north latitude. As shown by the Treaty with Spain in 1819, the Treaty with Mexico in 1828, the Treaty with the Republic of Texas in 1838, and the Joint Boundary Commission Survey and Report (1840-1841), the United States was acting for itself as a sovereign Nation with respect to its own territory. Long prior to these treaties and surveys, the United States had exclusive jurisdiction over and ownership of the western half of Sabine Pass, Sabine River and Sabine Lake, all of which portion of said streams were outside of and west of the western boundary of the State of Louisiana. The treaties merely confirmed the jurisdiction and title of the United States and limited the westward extent of the Nation's territorial claims under the Louisiana Purchase of 1803.

The western boundary of the State of Louisiana along the geographic middle of the Sabine River as fixed by the Congress of the United States in 1811 and by the Constitution of the State of Louisiana in 1812 was not in any manner changed or altered by the aforesaid international agreement between the United States and other nations. Neither has such boundary ever been changed, moved westward or otherwise altered by joint action of the Congress and the State of Louisiana as is required by the Constitution of the United States in order for a state boundary to be fixed or changed.

The exclusive jurisdiction of the United States over and title to the western half of the Sabine, subject to common use of the waters for navigation, continued from 1812 until 1849, when, with the specific authorization of Congress (9 Stat. 245), the State

of Texas extended its eastern boundary "so as to include within her limits one half of Sabine Pass, one half of Sabine Lake, also one half of Sabine River, from its mouth as far north as the 32nd degree of north latitude . . ." (3 Gammel's Laws of Texas 442).

In answer to numbered paragraph 2 of Counterclaim No. 1, the State of Texas denies that the State of Louisiana since 1819 has recognized and asserted its west boundary from the Gulf to the 32nd degree of north latitude to be the west bank of Sabine River. On the contrary, by Resolution 212 of the Legislature of the State of Louisiana in 1848, that State specifically recognized the western half of Sabine River to be part of the territory of the United States over which ". . . the constitution and the laws of the State of Louisiana, nor those of any other State or territory, extend . . . and that it is of importance . . . that the jurisdiction of some State should be extended over said territory. . ." For more than 90 years after Congress permitted Texas to extend its boundary to include such territory, the State of Louisiana, acting through its Legislature, its Supreme Court, its Attorney General and its public agencies, recognized that the western half of Sabine River (including Sabine Pass and Sabine Lake) were within the boundaries of the State of Texas and acquiesced in the continuous jurisdiction and ownership exercised by the State of Texas during such time and even until the present controversy arose.

In answer to numbered paragraph 3 of Counterclaim No. 1, the State of Texas admits that it has stipulated that its eastern boundary between the 32nd

and 33rd degrees of north latitude is a line marked on the ground in 1840-1841 by Commissioners appointed by the United States and the Republic of Texas from the junction of the west bank of the Sabine River with the 32nd degree of north latitude, thence north to the 33rd degree of north latitude, the same being that portion of the eastern boundary of Texas which lies north of the 32nd degree of north latitude. That particular portion of the eastern boundary of Texas remained as marked on the ground by the United States and the Republic of Texas, because Congress has not authorized Texas to extend that portion of its boundary eastward to the original western boundary of the State of Louisiana as it did with respect to the Sabine River portion of said boundary.

Whether Congress ever authorized Louisiana to make a westward extension of that portion of its western boundary lying north of the 32nd degree of north latitude so as to coincide with the eastern boundary of Texas is not an issue in this case. Whatever may be the rights of the State of Louisiana to land west of that portion of its original boundary lying north of the 32nd degree of north latitude (a narrow strip lying between parallel lines, one drawn due north from the middle of the Sabine and the other drawn due north from the west bank of the Sabine) is a matter entirely between the State of Louisiana and the United States. The strip is not claimed by the State of Texas; is not involved in this lawsuit; and has no bearing on this controversy.

ANSWER TO COUNTERCLAIM NO. 2

The State of Texas denies that Louisiana acquired

any ownership of the bed and subsoil of the western half of Sabine River by reason of the aforesaid treaties and surveys made between the United States and Spain, Mexico, and the Republic of Texas, because the property, being outside of and west of the western boundary of the State of Louisiana, was owned by the United States until Congress authorized Texas to include the area within its boundaries in 1848. Answering Defendant's subparagraphs in the order lettered under Counterclaim No. 2, Plaintiff respectfully avers:

(a) That after the 1819 Treaty of Limits between the United States and Spain was finally ratified and proclaimed on February 22, 1821, the United States gave up its claim to the territory west of the Sabine known as the Province of Texas, but between 1819 and 1835 the United States continuously engaged in negotiations with Spain and Mexico in an attempt to repurchase the area. By temporarily limiting its territory to the west bank of the Sabine, the United States did not lose or forfeit its title to the bed and subsoil of the western half of Sabine River, Lake and Pass to the State of Louisiana.

(b) Plaintiff denies that the State of Louisiana asserted any right to ownership of the bed and subsoil of the Sabine River by Resolution 212 of the State Legislature in 1848. On the contrary, this Resolution recognizes that the western half of the Sabine was owned by the United States in 1848 and that the State of Louisiana had no jurisdiction thereover.

(c) Plaintiff denies that the State of Louisiana acquired all islands in the Sabine, admitting only that Louisiana's western boundary included all islands

in the eastern half of the Sabine River, Lake and Pass. Inclusion of these islands had no effect upon the ownership of the bed and subsoil of the western half of the Sabine.

(d) Plaintiff denies that the State of Louisiana was to encompass all of the Orleans Territory. The Enabling Act of 1811, the Louisiana Constitution of 1812, and the Act of Admission of 1812 clearly provide for the boundaries of the State of Louisiana to include only "that part of the territory or country ceded under the name of Louisiana. . . contained within the following limits: beginning at the mouth of the river Sabine, thence by a line drawn along the middle of said river, including all islands to the thirty-second degree of latitude. . . ," which line specifically limited its western boundary. Section 3 of the Act of Admission (2 Stat. 701) recites that after creation of the State there is a "residue of that portion of country which was comprehended within the territory of Orleans," and that the State and the residue of the territory shall comprise one judicial district.

ANSWER TO COUNTERCLAIM NO. 3

Plaintiff denies that the location of the "line to be drawn along the middle" of Sabine River as the western boundary of Louisiana and eastern boundary of Texas is to be determined "under accepted international law," because this boundary was fixed in the geographic middle of the Sabine by the United States Congress and the constitutional and legislative acts of the respective States. The domestic law of the United States having been employed, it cannot be superseded by international law.

If Defendant means this Counterclaim as an assertion that the boundary is located other than in the geographic middle of Sabine River, Sabine Lake and Sabine Pass, Plaintiff denies such allegation and asserts that the geographic middle, as distinguished from the middle of a main channel of navigation (the Thalweg), was intended and provided for by the Congress and the Constitution of Louisiana. This intent and meaning was confirmed by the subsequent Act of Congress permitting Texas to "include within her limits one half of Sabine Pass, one half of Sabine Lake, also one half of Sabine River. . .," and by the Senate Judiciary Committee Report on said Act (9 Stat. 245) which stated:

"The boundary of the State of Louisiana extended to the middle of the Sabine; so that half of the river and lake, to the western shore, belonged to the United States, and was not included in the State of Louisiana . . ."

The Thalweg rule is wholly inapplicable to the Sabine boundary because:

1. The United States, as common source proprietor, and the adjacent States provided for a geographic middle line.
2. The whole basis for the Thalweg rule (to provide equal opportunity for use of the main channel of navigation) is absent in this case, because free and common use of the entire river for navigation was reserved "as well to the inhabitants of said state as to the inhabitants of other states and the territories of the United States" in the Louisiana Act of Admission (2 Stat. 701) and by a similar provision in the Treaty of 1819 with Spain.

3. There was no well defined or habitually used main channel of navigation in Sabine Pass, Sabine Lake or Sabine River in 1812 or thereafter until man-made channels were dredged.

That the geographic middle was intended and provided in the Sabine River, Pass and Lake has been the consistent interpretation of the United States through the Congress and all Federal agencies mapping, improving, using and otherwise dealing with the Sabine and structures thereon since 1812. This interpretation was acquiesced in and followed by the State of Louisiana and its public agencies for more than 100 years.

Since 1849, the State of Texas has exercised State jurisdiction and has possessed and asserted ownership of the western half of said streams and the bed and subsoil thereof, from the geographic middle to the western shores and banks, subject only to the common use of the waters for navigation, which was reserved equally to the inhabitants of both States. For at least 100 years the State of Louisiana acquiesced in such exercise of jurisdiction and ownership by the State of Texas eastward to the geographic middle of said streams, including specific acts of recognition and acquiescence by the Legislature, the Supreme Court and the Attorney General of Louisiana. By reason of such prescription on the part of Texas and acquiescence on the part of Louisiana, the geographic middle of the Sabine streams is the common boundary between the two States, and Louisiana is estopped from claiming otherwise.

Texas admits that Louisiana has title to all islands which existed in the eastern half of the Sabine River

in 1812 and those which may have been formed within the eastern half thereof since 1812. Texas denies that Louisiana has title to any islands within the western half of Sabine River, Sabine Pass or Sabine Lake.

**COUNTERCLAIMS RAISE NO MATERIAL
ISSUES OF FACT AND ARE INVALID
AS A MATTER OF LAW**

Plaintiff further asserts that the Counterclaims fail to present any material issue of fact and are invalid as a matter of law. They are asserted as a "Sixth Defense" to Plaintiff's Complaint and relate to the same questions of law heretofore raised by the pleadings, none of which require evidence other than the undisputed facts of which the Court and the Special Master may take judicial notice or ascertain through the pending summary judgment proceeding. These questions of law are covered by Plaintiff's Motion for Summary Judgment, and Plaintiff renews its Motion with respect thereto.

Wherefore, Plaintiff prays that the Counterclaims be denied and that Plaintiff have judgment as prayed for as a matter of law.

Respectfully submitted,

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CERTIFICATE

I, Crawford C. Martin, Attorney General of Texas, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the — day of August, 1970, I served copies of the foregoing Answer to Counterclaims of the State of Louisiana, by first class mail, postage prepaid, to the office of the Governor and Attorney General, respectively, of the State of Louisiana.

CRAWFORD C. MARTIN
Attorney General of Texas